

REMARKS

In response to the above-identified Final Office Action ("Action"), Applicants traverse the Examiner's rejection to the claims and seeks reconsideration thereof. Claims 1-15 are now pending in the present application. In this response, claim 1 has been amended, no claims have been added and claims 2 and 3 have been cancelled.

The instant application is directed to a composition comprising, a glycol, a silicone, a quaternium and a polymer viscosity modulator, wherein the composition has a pH in a range of 2.8 to 3.2.

I. Claim Amendment

Applicants respectfully submit the attached amendment to claim 1. Claim 1 has been amended to recite that the composition has a pH in a range of 2.8 to 3.2. Support for the amendment is found, for example, in original claim 3 and on page 3, paragraph [0012] of the application. Thus, the amendment to claim 1 is supported by the specification and does not add new matter. Applicants respectfully submit the amendment to claim 1 places the claim in condition for allowance and/or in better form for appeal. See MPEP 714.12. In view of the foregoing, Applicants respectfully request consideration and entry of the amendment to claim 1.

II. Claim Rejections – 35 U.S.C. §102(b)

A. In the outstanding Action, claims 1, 5, 7, 8 and 14 are rejected under 35 U.S.C. §102(b) as being anticipated by Flick, (Cosmetic and Toiletry Formulations, 2001). Applicants respectfully traverse the rejections.

In regard to claim 1, Flick 2001 fails to teach a composition "wherein the composition has a pH in a range of 2.8 to 3.2" as recited in amended claim 1. Applicants respectfully submit the claimed pH range of 2.8 to 3.2 was previously presented in now cancelled claim 3. The Examiner has not pointed to, and Applicants are unable to discern a portion of Flick 2001 teaching this element. Instead, Flick 2001 teaches a body wash having a pH of 5.5. See Flick

2001, page 30. Moreover, the Examiner's failure to reject now cancelled claim 3 which previously presented this limitation in view of Flick 2001 further evidences the failure of the reference to teach at least this element. Since Flick 2001 fails to teach all the elements of claim 1, anticipation may not be found. For at least the foregoing reasons, Applicants respectfully request reconsideration and withdrawal of the rejection of claim 1 under 35 U.S.C. §102.

In regard to claims 5, 7, 8 and 14, these claims depend from claim 1 and incorporate the limitations thereof. Thus, for at least the reasons discussed in regard to claim 1, Flick 2001 fails to teach each and every element of claims 5, 7, 8 and 14. For at least the foregoing reasons, Applicants respectfully request reconsideration and withdrawal of the rejection of claims 5, 7, 8 and 14 under 35 U.S.C. §102.

B. In the outstanding Action, claims 1, 5-7 and 9 are rejected under 35 U.S.C. §102(b) as being anticipated by Braun et al. (Rheology Modifiers Handbook) ("Braun"). Applicants respectfully traverse the rejections.

In regard to claim 1, Braun fails to teach a composition "wherein the composition has a pH in a range of 2.8 to 3.2" as recited in amended claim 1. Applicants respectfully submit the claimed pH range of 2.8 to 3.2 was previously presented in now cancelled claim 3. The Examiner has not pointed to, and Applicants are unable to discern a portion of Braun teaching this element. Instead, Braun teaches a hair defining complex having no particular pH range. See Braun, page 377. Moreover, the Examiner's failure to reject claim 3 in view of Braun further evidences the failure of the reference to teach at least this element. Since Braun fails to teach all the elements of claim 1, anticipation may not be found. For at least the foregoing reasons, Applicants respectfully request reconsideration and withdrawal of the rejection of claim 1 under 35 U.S.C. §102.

In regard to claims 5-7 and 9, these claims depend from claim 1 and incorporate the limitations thereof. Thus, for at least the reasons discussed in regard to claim 1, Flick 2001 fails to teach each and every element of claims 5-7 and 9. For at least the foregoing reasons, Applicants respectfully request reconsideration and withdrawal of the rejection of claims 5-7 and 9 under 35 U.S.C. §102.

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C. In the outstanding Action, claims 1-5 and 7 are rejected under 35 U.S.C. §102(b) as being anticipated by U. S. Patent No. 4,818,523 issued to Clarke et al ("Clarke"). Applicants respectfully traverse the rejections.

In regard to claim 1, Clarke fails to teach at least the elements of a silicone in an amount of "2% to 30% by weight" as required by claim 1. Clarke teaches a hair rinse conditioner. See Clarke, Abstract. The Examiner alleges Clarke teaches a silicone in an amount of about 0.5% to 1.5% and therefore reads on the claimed amount of 2%. See Action, page 3. Applicants respectfully disagree with the Examiner's finding of anticipation on this basis. In order to find anticipation of a claimed range, the reference must teach a range within, overlapping or touching the claimed range with sufficient specificity. See MPEP 2131.03(II). A value or range very close to, but not overlapping or touching the claimed range does not anticipate the claimed range. See MPEP 2131.03(III). Applicants respectfully submit a range of 0.5% to 1.5% as provided in Clarke, is neither within, overlapping or touching Applicants' claimed range of "2% to 30% by weight" therefore the Examiner has not shown that Clarke teaches at least this element. Since Clarke fails to teach all the elements of claim 1 anticipation may not be found. For at least the foregoing reasons, Applicants respectfully request reconsideration and withdrawal of the rejection of claim 1 under 35 U.S.C. §102.

In regard to claims 2-5 and 7, claims 2-3 are cancelled and claims 4-5 and 7 depend from claim 1 and incorporate the limitations thereof. Thus, for at least the reasons discussed in regard to claim 1, Clarke fails to teach each and every element of claims 4-5 and 7. For at least the foregoing reasons, Applicants respectfully request reconsideration and withdrawal of the rejection of claims 4-5 and 7 under 35 U.S.C. §102.

IV. Claim Rejections – 35 U.S.C. §103(a)

A. In the outstanding Action, claims 1, 2, 5-8, 13-15 are rejected under 35 U.S.C. §103(a) as being anticipated by Flick 1997, (Cosmetic and Toiletry Formulations, 1997). Applicants respectfully traverse the rejections.

To establish a *prima facie* case of obviousness, the Examiner must show that the cited reference teaches or suggests each of the elements of a claim. Hindsight reconstruction may not be used to modify the reference to meet the claimed invention. MPEP §2145. Furthermore, the fact that the claimed invention is within the capabilities of one of ordinary skill in the art, without some showing of an objective reason for modifying the reference to arrive at the claimed invention, is not sufficient to establish a *prima facie* case of obviousness. *In re Kotzab*, 217 F.3d 1365, 1371, 55 USPQ2d 1313, 1318 (Fed. Cir. 2000).

In regard to claim 1, Flick 1997 fails to teach a composition including “a quaternium,” “a silicone in an amount of 2% to about 30% by weight” and “wherein the composition has a pH in a range of 2.8 to 3.2” as recited in amended claim 1.

Flick 1997 generally teaches a skin treatment cream. See Flick 1997, page 148. The Examiner alleges a mixture of 4.76% glycerin (glycol), 1.43% veegum and 0.29% xanthan gum (polymeric viscosity modifiers), 1.43% dimethicone, 7.14% glycolic acid, 63.51% water and cetyl alcohol teaches each of the elements of claim 1. See Action, page 34. The Examiner, however, fails to point to, and Applicants are unable to discern, any of the listed ingredients teaching a quaternium. Moreover, 1.43% dimethicone as taught in Flick 1997 does not overlap, lie within or even touch Applicants’ claimed range of “2% to about 30%” and Flick 1997 does not contemplate increasing the amount of dimethicone in the composition. Accordingly, it would only be upon viewing Applicants’ specification that “2% to about 30%” of silicone would be understood by one of ordinary skill in the art to be desirable and arrived at without undue experimentation. As such, Flick 1997 further fails to teach or suggest this element. Lastly, the Examiner has not pointed to, and Applicants are unable to discern a portion of Flick 1997 teaching a “pH in a range of 2.8 to 3.2” as further recited in amended claim 1. In fact, the Examiner’s failure to reject claim 3, which previously recited the pH range now recited in claim 1, in view of Flick 1997 in the Action evidences the failure of the reference to teach or suggest this additional element. Since Flick 1997 fails to teach or suggest all the elements of claim 1, a *prima facie* case of obviousness may not be established. For at least the foregoing reasons, Applicants respectfully request reconsideration and withdrawal of the rejection of claim 1 under 35 U.S.C. §103.

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In regard to dependent claim 6, claim 6 depends from claim 1 and incorporates the limitations thereof. Thus, for at least the reasons discussed above in regard to claim 1, Flick 1997 fails to teach or suggest each and every element of dependent claim 6 and therefore claim 6 is not obvious in view of the reference. In addition, Flick 1997 further fails to teach or suggest at least the element of a composition comprising "about 4% to about 30% silicone by weight" as recited in claim 6. As previously discussed, Flick 1977 teaches using 1.43% dimethicone and therefore the disclosed range is not within, overlapping or touching the claimed range and therefore does not teach or suggest this element. Thus, for at least these additional reasons, claim 6 is not obvious in view of Flick 1997. Applicants respectfully request reconsideration and withdrawal of the rejection of claim 6 under 35 U.S.C. §103.

In regard to claims 2, 5, 7-8 and 13-14, claim 2 has been cancelled, claims 5-8, 13-14 depend from claim 1 and incorporate the limitations thereof. Thus, for at least the reasons discussed in regard to claim 1, Flick 1997 fails to teach each and every element of claims 2, 5, 7-8, 13-14. For at least the foregoing reasons, Applicants respectfully request reconsideration and withdrawal of the rejection of claims 2, 5, 7-8 and 13-14 under 35 U.S.C. §103.

In regard to claim 15, similar to claim 1, claim 15 recites a composition comprising a quaternium. Thus, for at least the reasons discussed in regard to claim 1, Flick 1997 fails to teach at least this element of claim 15.

In addition, claim 15 recites the elements of rubbing the skin to distribute the composition over the skin and leaving the composition on the skin. Flick 1997 further fails to teach these elements. The Examiner recognizes the failure of Flick 1997 to expressly teach these elements and instead alleges Applicants' claimed topical application would be an obvious use of the product. Applicants respectfully disagree with the Examiner's conclusion. In order for a *prima facie* case of obviousness to be found, the relied upon reference must teach or suggest each and every element of the rejected claim. Flick 1997 suggests nothing more about the use of the composition than that it is for treatment and rejuvenation of the skin. There are many methods in which a composition for treating skin may be applied. For example, the composition may be applied to the skin as a spray or dispersed within, for example, a bath, and soaked in by the user.

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In either case, rubbing of the skin would not be required in order to distribute the composition. In addition, such a skin composition may be applied and then washed away or rubbed off to prevent over treatment of the skin. Thus, in as much as Flick 1997 is silent as the use of the skin treatment composition and the composition of Flick 1997 may be applied to the skin without rubbing and/or removed after application, the elements of rubbing the skin to distribute the composition over the skin and leaving the composition on the skin are not obvious uses. Since Flick 1997 fails to teach all the elements of claim 15, a *prima facie* case of obviousness may not be found. For at least the foregoing reasons, Applicants respectfully request reconsideration and withdrawal of the rejection of claim 15 under 35 U.S.C. §103.

B. In the outstanding Action, claims 1, 5-11, 13 and 14 are rejected under 35 U.S.C. §102(b) as being anticipated by U. S. Patent No. 6,927,205 issued to Patt, et al ("Patt"). Applicants respectfully traverse the rejections.

In regard to claim 1, Patt fails to teach or suggest at least the element of a silicone in an amount of "2% to 30% by weight" and a "pH in a range of 2.8 to 3.2" as required by claim 1. Patt generally teaches a composition for treatment of psoriasis. See Patt, Abstract. The Examiner alleges Patt illustrates the use of cetyl dimethicone copolyol 1% and dimethicone in 50% and therefore teaches "2% to 30% by weight" silicone as recited in claim 1. See Action, page 5. Applicants respectfully submit, for at least the reasons previously discussed, a composition including 1% or 50% of dimethicone does not teach or suggest "2% to 30% by weight" silicone. In particular, a reference which fails to teach or suggest a claimed range and instead teaches a range entirely outside of the claimed range and further fails to even contemplate modifying the disclosed range to arrive at the claimed range does not teach or suggest the claimed range. Moreover, the Examiner has not pointed to, and Applicants are unable to discern, a portion of Patt teaching a "pH in a range of 2.8 to 3.2" as further recited in claim 1. The references failure in this regard is further evidenced by the Examiners failure to reject claim 3, which previously recited this limitation, in view of Patt. Since Patt fails to teach or suggest all the elements of claim 1, claim 1 is not obvious over the reference. For at least the foregoing reasons, Applicants respectfully request reconsideration and withdrawal of the rejection of claim 1 under 35 U.S.C. §103.

In regard to dependent claim 6, claim 6 depends from claim 1 and incorporates the limitations thereof. Thus, for at least the reasons discussed above in regard to claim 1, Patt fails to teach or suggest each and every element of dependent claim 6 and therefore claim 6 is not obvious in view of the reference. In addition, Patt further fails to teach or suggest at least the element of a composition comprising "about 4% to about 30% silicone by weight" as recited in claim 6. As previously discussed, Patt teaches using 1% or 50% of dimethicone and therefore the disclosed range is not within, overlapping or touching the claimed range and therefore does not teach or suggest this element. Thus, for at least these additional reasons, claim 6 is not obvious over Patt. Applicants respectfully request reconsideration and withdrawal of the rejection of claim 6 under 35 U.S.C. §103.

In regard to claims 5, 7-11, 13 and 14, these claims depend from claim 1 and incorporate the limitations thereof. Thus, for at least the reasons discussed in regard to claim 1, Patt fails to teach or suggest each and every element of claims 5, 7-11, 13 and 14. For at least the foregoing reasons, Applicants respectfully request reconsideration and withdrawal of the rejection of claims 5, 7-11, 13 and 14 under 35 U.S.C. §103.

C. In the outstanding Action, claims 1, 5, 7-9, 11-14 are rejected under 35 U.S.C. §103(a) as being unpatentable over U. S. Patent No. 6,709,663 issued to Espinoza ("Espinoza"). Applicants respectfully traverse the rejections.

In regard to claim 1, Espinoza fails to teach or suggest a composition including the claimed elements of "a polymer viscosity modulator" and a "pH in a range of 2.8 to 3.2". The Examiner admits Espinoza fails to disclose a specific formulation incorporating a polymer viscosity modulator as claimed and instead alleges such a modification would have been obvious in order to increase the viscosity of the composition. See Action, page 6. The Examiner, however, has not pointed to any portion of the reference contemplating such an increase in viscosity. Accordingly, it would only be upon review of Applicants' disclosure that motivation for such a modification would be found. As the Examiner is no doubt aware, such hindsight reconstruction is inappropriate as a matter of law. The Examiner further fails to point to, and Applicants are unable to discern, a portion of the reference teaching or suggesting a formulation

including a "pH in a range of 2.8 to 3.2" as recited in claim 1. Since Espinoza fails to teach or suggest all the elements of claim 1, a *prima facie* case of obviousness may not be established. For at least the foregoing reasons, Applicants respectfully request reconsideration and withdrawal of the rejection of claim 1 under 35 U.S.C. §103.

In regard to claims 5, 7-9, 11-14, these claims depend from claim 1 and incorporate the limitations thereof. Thus, for at least the reasons discussed in regard to claim 1, Espinoza fails to teach or suggest each and every element of claims 5, 7-9, 11-14. For at least the foregoing reasons, Applicants respectfully request reconsideration and withdrawal of the rejection of claims 5, 7-9, 11-14 under 35 U.S.C. §103.

CONCLUSION

In view of the foregoing, it is believed that all claims now pending, namely Claims 1 and 4-15, are now in condition for allowance and such action is earnestly solicited at the earliest possible date. If there are any additional fees due in connection with the filing of this response, please charge those fees to our Deposit Account No. 02-2666. Questions regarding this matter should be directed to the undersigned at (310) 207-3800.

Respectfully submitted,

BLAKELY, SOKOLOFF, TAYLOR, & ZAFMAN LLP

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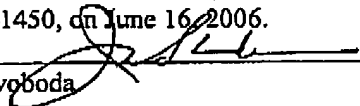
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I hereby certify that this correspondence is being transmitted via facsimile No. (571)273-8300 to: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on June 16, 2006.


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